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TO: Assembly Committee on Criminal Justice

FROM: Bob Andersen

*Bob Andersen*

RE: Assembly Bill 260 relating to: permitting an employer to refuse to employ or to terminate from employment an individual who has been convicted of a sex offense or a violent offense and preempting cities, villages, town, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit activity that is allowed under the state fair employment law.

DATE: April 24, 2007

1. **Wisconsin State Journal Issues 15 Part Series Imploring Employers to Hire Ex-Offenders – AB 260 is Going in the Wrong Direction: The Movement Nationally and in Wisconsin is Towards Rehabilitating Ex-Convicts – in the Face of Massive Incarceration Efforts Over the Past Several Years.**

In a series of articles, the Wisconsin State Journal has editorialized that we need to be effective, not soft on crime (January 28, 2005). We need to "recruit employers to hire former inmates. Many offenders have poor work histories but those under close supervision will have a compelling incentive to show up on time and ready for work."

These articles of the Wisconsin State Journal are part of a series that may be found at <http://www.madison.com/wsj/spe/prison>. They are a series of 15 articles exhorting the public and policy makers to make sensible decisions about treating crime and the rehabilitation of ex-convicts.

According to a January 17, 2005 WSJ article by Phil Brinkman, the state's inmate population has tripled in 15 years, from less than 7,000 in 1989 to more than 22,000 today. The incarceration rate has also nearly tripled. National studies indicate as many as 60 percent of inmates remain unemployed one year after release, while two in three are re-arrested within three years and nearly one-half will end up back in prison, according to a January 16, 2005 WSJ article by the same author. The cost to taxpayers can be enormous. It costs Wisconsin taxpayers \$28,088 on average per year to keep each of the estimated 22,000 men and women in prison and \$2,041 a year supervising more than 67,700 people on probation or parole, according to the same article.



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A January 22, 2005 WSJ article summed up the shift in direction that has been occurring among policy makers by quoting former State Senator Bob Welch, in remarks he made about creating halfway houses for the reintegration of offenders. The article said that "Welch had been one of the strongest supporters during the 1990's for longer prison terms and abolishing parole."

It quoted Welch as saying, "As far as I am concerned, I was on the winning side of that and got my way. . . Now, I am circling back and saying, 'OK, now that I know we're going to lock up the bad guys for a sufficient length of time, now we've got to look at what happens when they get out.'"

According to the national Re-Entry Policy Council, 650,000 people are released from prisons and over 7 million people are released from jails each year nationally. Virtually every person incarcerated in a jail in this country – and 97 percent of those incarcerated in prisons – will eventually be released. The Re-Entry Policy Council was established in 2001 by The Council of State Governments to assist state government officials grappling with the increasing number of people leaving prisons and jails to return to the communities they left behind.

In 2004, 500 felons were released from prison to Dane County, according to an article by Phil Brinkman for the Wisconsin State Journal (WSJ – September 27 2005).

According to the Bureau of Justice Statistics of the U.S. Department of Justice, there were *8,107 inmates released from prison in 2003* in Wisconsin. According to the Wisconsin Office of Justice Assistance, there were *266,343 estimated adult admissions to jails in Wisconsin in 2003*. In addition, there were an estimated *11,075 admissions of 17 year olds in 2003*. Because jail inmates are in jail for only a relatively short period of time, *they will almost all be released within the year*.

2. **Assembly Bill 260 is Impractical, Because Job Applicants Won't Know What is Meant by a "Sex Offense" or a "Violent Offense."**

The job application is one of the most important tools for employers to weed out people whom they should not hire because of their conviction records. That is because, in many, if not most, cases, it is easy to refuse to hire an applicant, not because of a conviction record, but because the applicant lies on the application form. Under this bill, an applicant will have little idea how to answer the question, "Have you ever been convicted of a sex offense?" and even less idea how to answer the question, "Have you ever been convicted of a violent offense?" As a result, questions will go unanswered and it will be more difficult for an employer to prove that the applicant lied on the application form.

The alternative is to list in the application what is meant under this bill as "sex offense": a violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22

(2), 940.225 (1), (2) or (3), 944.06, 948.02 (1) or (2), 948.025, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, 948.095, 948.11 (2) (a) or (am), 948.12, 948.13, or 948.30, or of s. 940.30 or 940.31 if the victim was a minor and the person who committed the violation was not the victim's parent

And to list in the application what is meant as a "violent offense": a crime specified in s. 940.19 (3), 1999 stats., s. 940.195 (3), 1999 stats., s. 943.23 (1m), 1999 stats., or s. 943.23 (1r), 1999 stats., or s. 940.01, 940.02, 940.03, 940.05, 940.06, 940.08, 940.09, 940.10, 940.19 (4) or (5), 940.195 (4) or (5), 940.20, 940.201, 940.203, 940.21, 940.225 (1) to (3), 940.23, 940.285 (2) (a) 1. or 2., 940.29, 940.295 (3) (b) 1g., 1m., 1r., 2., or 3., 940.31, 940.43 (1) to (3), 940.45 (1) to (3), 941.20 (2) or (3), 941.26, 941.30, 941.327, 943.01 (2) (c), 943.011, 943.013, 943.02, 943.04, 943.06, 943.10 (2), 943.23 (1g), 943.30, 943.32, 946.43, 947.015, 948.02 (1) or (2), 948.025, 948.03, 948.04, 948.05, 948.06, 948.07, 948.08, 948.085, or 948.30.

First, of course, few people are likely to know what statute they were convicted under. Secondly, the application becomes so confusing or unwieldy as to lose its effectiveness as a tool for denying employment to someone who should be denied employment.

3. **Assembly Bill 260 Uses the Wrong Standard in Determining Fitness Based on "Conviction" Rather than "Circumstances of the Offense," as is Used Under Current Law.**

Existing law was created to avoid exactly the pitfall that Assembly Bill 260 would create. Instead of looking at what a person was *actually convicted of*, current law takes a realistic look at the conduct engaged in by the job applicant or the current employee, *to avoid being trapped by the effect of a plea bargain*. Under Assembly bill 260, a very violent and antisocial person can escape notice because he pled guilty to "disorderly conduct," rather than the battery he was charged with.

Current law was deliberately designed to allow an employer to look at the "circumstances of the offense" and the "circumstances of the job," rather than to be fenced in by a categorical and unforgiving analysis that depends on what a person was *convicted of*.

4. **Current Law Allows Employers to Discriminate Against Employees on the Basis of Conviction Records, Where the "Circumstances of the Offense Substantially Relate to the Circumstances of a Particular Job." – AB 260 Allows Employers to Discriminate Against Employees Solely Because They Checked a Box Marked "Sex Offenses or" "Violent Offenses" Alone.**

Under current law, a public or private employer may refuse to hire someone, or may terminate the person's employment, on the basis of any conviction record, if there is a substantial relationship between the circumstances of that offense and the

circumstances of the particular job. This is perceived to be a better approach than looking only at the conviction, because looking at the circumstances involved in the crime is far more revealing for an employer than looking only at what a person was convicted of -- especially where the person was convicted of a lesser offense. Current law does not require an employer to hire a person with a conviction record; it simply does not allow an employer to automatically reject an applicant who has checked a box on an application marked "sex offense" or "violent offense" for example. Employers can refuse to hire someone for any other reason. AB 260 would allow these employers to automatically reject an applicant or fire an employee with any "sex offense" or "violent offense", for simply having checked a box.

5. There Has Never Been Any Documentation in Support of This or Parallel Legislation That Has Been Introduced Over the Years.

This legislation, relating to all employers, and parallel legislation, relating to "educational institutions," has never been supported by any documentation that this is a problem over the many years that these bills have been introduced.

In an article in the August 28, 1999 edition of the *Milwaukee Journal Sentinel*, the results of a study undertaken by that newspaper showed that for all employers the records of the Equal Rights Division indicate that from January 1, 1997 to August 26, 1999, a total of 131 claims of discrimination based on arrest or conviction records were filed. Of those, only 22 were shown to have probable cause -- meaning that the claims would go any further. Of those, in only 2 claims was it shown that the action of the employer was in violation of the law.

For all the years that these bills have been introduced, the records of the Equal Rights Division similarly show that there are relatively few claims filed under current law and that it is rare for an employee or applicant to prevail.

In other words, in almost all claims there is always some "substantial relationship between the circumstance of the offense and the circumstances of the job." For example, in one of the few court decisions to come out of the statute, the Supreme Court found that there was a "substantial relationship" between a record of armed robbery and a job as a bus driver, so as to entitle the employer to refuse the job to the applicant on that basis alone. Similarly, LIRC and county court decisions have held that convictions involving drug trafficking are substantially related to jobs as a district agent for an insurer, youth counselor for emotionally disturbed juveniles, a school bus driver, a home health aid, a paper mill machine operator, and a door to door salesman.

With this stark reality as a background, anecdotal claims of inconvenience for employers or of cases that are contrived by lawyers to extort money from employers become difficult to imagine.

6. **The Value of Current Law, Then, is Simply to Prevent Employers from Establishing Application Forms that Automatically Reject Applicants who Check Particular Boxes, Without any Further Inquiry."**

*Under current law, these employers can easily refuse to hire someone for "other reasons," or because they want to hire someone else.* They simply cannot say they are refusing to hire someone because of a conviction *alone*.

7. **Employment is Critical in the Rehabilitation of Ex-Offenders and the Treatment of Ex-Offenders has a Profound Effect on African Americans.**

Numerous studies conducted in the past show the importance of meaningful employment in the rehabilitation of ex-offenders. In a recent study, Princeton University Department of Economics Professors Bruce Western, Jeffrey Kling, and David Weiman, in their January 2001 publication entitled, "The Labor Consequences of Incarceration," found that the treatment of ex-offenders has a profound effect on African-American males. *On a typical day two years ago, Professor Western was quoted as saying, 29% of young African American male high school dropouts ages 22-30, were employed, while 41% (up from 26% in 1990) were in prison. He said that ex-offenders who do get jobs start work making 10-30% less than other African American high school dropouts.*

Professor Western also said that, without adequate jobs, these ex-offenders are unable to pay court costs that come out of their convictions, restitution to victims, and child support for their families. Professor Western was quoted to say that "we know that employment discourages crime, and because their employment opportunities are poor, they're more likely to commit crime again."

8. **Automatically Denying Jobs to Applicants Based on Conviction Records Frustrates State Efforts to Put its Residents to Work, Contributes to Recidivism, and Endangers State Residents' Safety and Property.**

If AB 260 were to be enacted, these employers would still be able to hire an applicant with a conviction record, of course. However, the enactment of this bill would promote a policy for these employers statewide that would deny employment to people based solely on their convictions. This frustrates the goal of the state in ensuring that its residents are engaged in gainful employment. It frustrates the goals and success of W-2, because many W-2 participants have convictions in their past. In addition, without employment, people are driven to commit crimes to support themselves. Numerous studies have shown that employment is one of the most important factors in combating recidivism. When people are driven to commit new crimes, more residents of the state become the victims of crime.

9. **Current Law is a Codification of Decisions of the U.S. Supreme Court, Federal and State Courts, the Equal Employment Opportunities Commission (EEOC) and the State Equal Rights Division (ERD). Holding that Discrimination Against Minorities on the Basis of Conviction Record, in the Absence of "Business Necessity," Constitutes Race Discrimination – The Enactment of AB 260 Will Not Change This Law.**

The U.S. Supreme Court ruled in Griggs v. Power Co., 401 U.S. 424 (1971), that discrimination based on circumstances which have a "disparate effect" on persons because of their race or national origin, is in fact discrimination based on race or national origin and is prohibited by Title VII of the Civil Rights Act of 1964, in the absence of a showing of "business necessity" in a particular case. This decision was followed by a number of federal and state court decisions, and decisions of the EEOC and ERD, in ruling that discrimination based on criminal record for minorities is in fact discrimination based on race or national origin, in violation of Title VII of the Civil Rights Act of 1964. This is so, because minorities have a greatly disproportionate record of convictions. The logic, then, is that to refuse employment or to take other adverse job treatment of a minority because of a record of conviction, without an adequate business reason, is in fact an adverse treatment of an employee because of race or national origin. It is racial discrimination in violation of Title VII and in violation of Wisconsin's statutory prohibition against discrimination based on race.

The Equal Employment Opportunities Commission (EEOC) states in its guidelines that an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

"To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related."

The "disparate impact" theory is still the law of the land. In April, 2002, the U.S. Supreme Court dismissed an appeal in an age discrimination case challenging the "disparate impact" theory, Adams v. Florida Power Corporation, No. 01-584. While there was no explanation given by the court for its dismissal, it was a dismissal of a case that the court had earlier approved for appeal and had even heard arguments on. In any event, the dismissal of the case means that the "disparate impact" theory is still the law.

10. **Other States' Laws**

Several states fair employment agencies and courts have issued decisions based on "disparate effect." Some have included "disparate effect" in their administrative rules or

statutes, e.g. Iowa. In addition, at least the following several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

*There have been at least two recent developments in other states, as states attempt to address the growing problem of putting ex-offenders to work:*

*Delaware enacted a law last year lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.*

*Illinois enacted a law this year that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.*

*Illinois Commission Guidelines also have been existence for some time and have the force of law and similarly applies to all employers:*

"Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefore unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals the individual as objectively unfit for the job."  
[emphasis added]

Otherwise, the following states maintain similar restrictions:

*Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.*

*New York statutes prohibit discrimination by any employer based on the applicant or employee having committed a criminal offense, without allowing employers any exception.*

*Washington prohibits discrimination by any employer on the basis of conviction records, except for those related to a particular job which are less than 7 years old, under*

regulations issued by the Washington State Human Rights Commission.

Minnesota provides that consideration of a criminal record by a private employer cannot be an absolute bar to employment and that the job-relatedness of the crime must be considered, under the administrative policies set forth in the Minnesota Department of Human Rights Pre-Employment Inquiry Guide. The guide is not an administrative rule, but the effect is the same, since it would be risky to ignore it, because it is the state agency's interpretation of state law.

Colorado's Civil Rights Commission similarly has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

Ohio's Civil Rights Commission pre-employment guide similarly advises employers that even any inquiry into convictions of applicants for jobs is unlawful, without any reference to "substantial relationship."

Connecticut statutes prohibit state employers from discriminating based on conviction record, unless the employer considers all of the following: (1) the relationship of the crime to the job; (2) the rehabilitation of the applicant or employee; and (3) the time that has elapsed since the conviction or release of the applicant from prison or jail.

Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is directly related to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.

11. **The Debate on this Legislation Over the Past Several Sessions is Now Dwarfed by a New Development – the Creation of CCAP for Easy Internet Access for Anybody to Check Up on Anybody Else's Arrest or Conviction Record.**

CCAP is a public domain created by the Wisconsin court system that now allows anybody access to the records of their fellow citizens at the touch of a button on their own personal computers. It has been recorded that there are over 1,000,000 hits per day on CCAP, according to the Director of State Courts, John Voelker. Employers checking out potential employees, landlords checking out potential tenants, parents checking out the backgrounds of boys who want to go out with their daughters, young people checking out others that they may want to date, neighbors checking out the background of their neighbors.

The existence of this new system underscores both (1) the need for the current statute requiring employers to show that there is a substantial relationship between the circumstances of a conviction and a particular job, because of all the information that is out in the public now and (2) the vitality of an argument that has been made against this legislation from the very beginning – that employers *in fact* refuse to hire people with arrest or conviction records. They just don't make it known that the *reason* they refuse to hire someone is because of an arrest or conviction record. *The law does not require an employer to hire a convict.* And the new CCAP internet system allows employers plenty of ability to find out about an arrest or criminal record and to refuse to hire the individual for no particular reason at all. *About the only time that an employer would get caught by this statute is if the employer deliberately announced he was not hiring a person because of an arrest or conviction record, so that the employer could set up a test case.*

Given this reality, why then is this current statute so important? Because, without it employers would simply have a box on their applications which asks whether the applicant has ever had a "sex offense" or "violent offense. Once the box is checked by an intake worker, the application will be set aside and the person will be automatically rejected.

Details about the growing CCAP system emerged from the testimony and discussions recently created Legislative Council Committee on Expunction of Criminal Records. The system is far from perfect. Once a criminal charge is dropped against a defendant, the records are not taken off the internet. There is a parallel system for recording records in Wisconsin operated by the Crime Information Bureau. For that system, once a District Attorney drops a charge, the records have to be taken off the system altogether. So, for CCAP, even innocent people are stigmatized.

CCAP claims to have improved its system by providing a summary of what has happened in each case. The problem with this is that readers either never get past the first message that someone is being prosecuted or, if they do, they don't fully understand what follows. Their overall impression for someone whose charges have been dropped or who were found innocent, is likely to be that the individual got off on a technicality. As a result, people who are innocent are wrongly stigmatized.

In the context of the work of this Legislative Council Committee, it is interesting to note that a business representative on that committee, who is a lawyer, said that the current statute works fine. He liked the expression that there has to be a substantial relationship between the circumstances of the offense and the circumstances of the job, which he thought is reasonable and has worked well. His comments were made when he asked why there should be any need for improvement of the law on expunction, which also addresses employment problems.

The Director of State Courts, John Voelker, told the committee that the WCCA oversight committee initially approached the legislature to address [1] whether CCAP information should be continued (because of its profound effect on employment, housing, "nosey neighbors," etc.); [2] whether information could be made to be more accurate (again with the same considerations in mind); and [3] whether a new mechanism should be created to allow information to be removed from the data base.